Supreme Court, U.S.
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NO. 02-1036

IN THE
SUPREME COURT OF THE UNITED STATES

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE COMMERCE CLAUSE DOES NOT PERMIT FEDERAL REGULATION OF ACCRUAL RULES FOR STATE LAW TORT CLAIMS.

A. Respondents Fail To Explain How The FRCD Accrual Rule "Substantially Affects" Interstate Commerce.

The Respondents and the Second Circuit assign false attributes to the FRCD and use those false attributes as the foundation for their contention that the FRCD affects interstate commerce. The FRCD simply lacks these talismanic properties.

Despite assertions to the contrary, the FRCD does not "regulate the manner in which injuries associated with [hazardous waste] are redressed." U.S. Br. p. 11. The FRCD does not create tort liability or any tort cause of action, nor does it regulate the generation or disposal of hazardous waste, compensate for injuries resulting from the release of hazardous waste, allocate costs associated with hazardous waste, encourage or deter conduct of companies that deal with hazardous waste materials, or create any legal standard for conduct or damages.

Respondents contend that the "greatest commercial impact" of the FRCD is that it reflects Congress' desire to shift the costs of toxic torts to industry rather than exposed victims and yet admit that "in enacting the FRCD, Congress chose not to interfere with states' decisions regarding provision of toxic tort remedies . . . ." Br. in Opp. pp. 6, 9.

The FRCD is an accrual rule and nothing more. It federally determines when the limitations clock begins to run on certain state law toxic tort claims. Despite its inclusion in CERCLA, the FRCD does not apply to *any* claim arising under CERCLA. *See, e.g., Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000) ("CERCLA does not provide compensation to a private party for damages

resulting from contamination"). Indeed, the state law personal injury and property damage claims to which the FRCD applies need not have any connection with a CERCLA site. *See, e.g., Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 107 (W.D.N.Y. 1994) ("there is nothing in the language of [the FRCD] that requires an underlying CERCLA action in order to apply the federally required commencement preemption of the state statute of limitations").

This Court made clear in *Lopez* that the regulated activity must *substantially* affect interstate commerce, and that a "mere effect" on commerce is not sufficient. *United States v. Lopez*, 514 U.S. 549, 559 (1995). In their failed effort to identify *any* commercial effect of the FRCD, Respondents ignore this applicable standard and do not even suggest that any effect they proffer is "substantial."

B. Respondents Fail To Explain How The FRCD Is Integral To CERCLA Or How Its Absence Would In Any Way Undercut CERCLA's Regulatory Scheme.

Respondents do not contend that the regulatory scheme of CERCLA would be undercut absent federal regulation of the accrual of state law personal injury claims. *Lopez*, 514 U.S. at 561. Without such a showing, the FRCD cannot be said to be an "integral" part of CERCLA. *Id.*

Nor is the FRCD "integral" to CERCLA merely because it grew out of a study commissioned by CERCLA. 42 U.S.C. 9651(e)(3)(F). The study group commissioned by Congress did not recommend enactment of the FRCD or anything resembling it. Moreover, Congress failed to follow each and every one of the study group's ten recommendations, including the ninth recommendation that in plenary state

court actions, *the states* amend their statutes of limitations to include the discovery rule.[1] Pet. App. H at 219a-220a.

The FRCD must stand or fall on its own merits and cannot ride the coattails of CERCLA. *See USA v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). This Court should grant certiorari to define the scope of the Commerce Clause's reach.

II. THE TENTH AMENDMENT DOES NOT PERMIT CONGRESS TO CHANGE STATE LAW.

This Court has stressed that the allocation and balancing of federal and state powers is a serious issue that has given rise to many of this Court's most "difficult and celebrated cases." *New York v. United States*, 505 U.S. 144, 155 (1992). And, indeed, Respondents concede that the FRCD raises Tenth Amendment concerns, that these concerns are "important," and that in enacting the FRCD Congress "usurp[s]" state law and "tread[s] on state sovereignty." Br. in Opp. p. 9.[2]

Nonetheless, Respondents ignore the essential reason why the FRCD is unconstitutional under the Tenth

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[1] In 1982 when the study group report was released, many states did not have discovery rules of accrual. By 1986, when the FRCD was passed, however, most states, including New York, had adopted a discovery rule of accrual. *See* New York CPLR § 214-c (1986). Thus, the study group's concern that a personal injury claim might be stale before a plaintiff even knew he was ill had largely been alleviated by the states through state amendment of state accrual rules.

[2] The United States' suggestion that the Tenth Amendment concerns raised by the FRCD are not "serious," U.S. Br. p. 13, is like saying a statute can be a "little unconstitutional." Surely this is not the case.

Amendment. They offer only a myopic view of the effect of the FRCD, focusing only on whether the FRCD forces state governments to act and virtually ignoring the fact that the FRCD impermissibly ties the states' hands and prevents them from regulating the accrual of their state law claims.

The FRCD commandeers the state legislative process and *federally* changes state law. No action by a state executive or legislature is necessary or even possible. The state is "precluded from rejecting the role envisioned for [it] by the federal government" as the FRCD "strips [New York] of choice and control over state policy." *Koog v. United States*, 79 F.3d 452, 457 (5th Cir. 1996). New York is not free to opt out of the federal scheme, nor is it free to reject claims that fail to comply with state law.

Respondents' reliance on the Supremacy Clause and pre-emption puts the cart before the horse and underscores why this Court should grant certiorari to establish the bounds of federalism. Only those federal laws that are consistent with the Constitution's allocation of power between the state and federal governments are "supreme" and therefore may pre-empt contrary state laws. *Printz v. United States*, 521 U.S. 898, 924-25 (1997). Under Respondents' logic, the Tenth Amendment is rendered void and meaningless because every federal law would automatically pre-empt contrary state law by virtue of the Supremacy Clause.[3] Yet, the Supremacy Clause does not "trump" the Tenth Amendment.

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[3] Contrary to the United States' notion, Congress is not free to change state law in the guise of regulating diversity cases. U.S. Br. p. 13. The constitutionality of a statute is not determined by venue. In any event, the FRCD is not limited to diversity cases, and under the *Erie* doctrine (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)), statute of limitations are

(Footnote continued on next page)

Petitioners know of no instance, other than the FRCD, where Congress has usurped state accrual rules for state law claims.[4] Congress' avoidance of such a practice for over two hundred years "far outweigh[s]" any suggestion that it may do so now. *Cf. Printz*, 521 U.S. at 917-18.

Respondents also fail to address the Tenth Amendment concerns raised by the inclusion of wrongful death claims in the purview of the FRCD. As set forth in the Petition, the FRCD further changes state law and further violates the Tenth Amendment in this expansion.

Also unpersuasive is the United States' suggestion that this Court should excuse the FRCD's federal incursion into state law because toxic tort defendants should have "greatly reduced expectations of repose" and states should have a lessened interest in affording toxic tort defendants the same rights as other state law tort defendants. U.S. Br. p. 15 n.5. The notion that the Constitution can play favorites or that the Tenth Amendment is subject to the vagaries of popular opinion is dangerous and warrants this Court's review.

(Footnote continued from previous page)
"substantive" and therefore governed by state and not federal law. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988).

[4] Any reliance on *Stewart v. Kahn*, 78 U.S. 493 (1870), is misplaced. *Stewart* involved the federal tolling of limitations periods during the Civil War. The statute at issue did not change state accrual rules as the FRCD does. This Court did not address the Tenth Amendment in *Stewart*, but rather found the statute at issue to be a valid exercise of Congress' war powers. The FRCD cannot be similarly justified.

III. RESPONDENTS FAIL TO ADDRESS THE ISSUE BEFORE THE COURT INVOLVING THE ROLE OF SUBJECTIVE FACTORS IN A "DISCOVERY RULE" ANALYSIS.

Respondents have failed to show why the Court should deny certiorari on the accrual issue. Respondents merely reframe the "issue presented" to ask whether summary judgment is precluded if an issue of fact exists as to "knew or reasonably should have known." Br. in Opp. p. i.[5] This is not a proper question for review, as, by definition, it has only one answer – "yes." Respondents apparently fear that the Court's review of the question of law presented by Petitioners will not only result in certiorari, it will result in reversal of the Second Circuit's holding.

Despite Respondents' attempts at obfuscation, the issue before this court on review stands:

> Whether under th[e] objective discovery rule [of the FRCD], and in the absence of diligent investigation by plaintiffs, accrual may be postponed or tolled as long as there is information questioning causation?

As even Respondents acknowledge, the objective question under review is "what a reasonably diligent plaintiff would have discovered" regarding the cause of his injury given the amount of evidence readily available. Br. in Opp. pp. 12-13 n.3. Once the reviewing court finds sufficient evidence to establish (for summary judgment purposes) that plaintiff "knew or with reasonable diligence should have

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[5] Respondents frame the issue as follows: "Whether ... summary judgment is precluded by the existence of competing inferences from the record as to whether Plaintiffs knew or should have known of the cause of their injuries."

known" of the potential cause of his injury, that plaintiff is deemed to be on notice so as to start the limitations clock.

Respondents give lip service to the "objective" standard for the accrual analysis (Br. in Opp. p. 11; see also Pet. App. A at 39a-40a) yet they include subjective factors that they feel lay suspicions to rest or otherwise cause one to disregard evidence suggesting cause. "Some evidence" questioning causation does not, however, extend accrual. Once it is determined that sufficient evidence exists to place a plaintiff on notice of a potential cause of his injury, it is irrelevant whether (s)he is "lulled into complacency" as to bringing suit – the claim has already accrued.[6] The subjective "excuse" for why (s)he may have questioned causation or why (s)he waited to commence suit does not save the claims, and plaintiff delays at his or her own risk.

Under the Respondents' and Second Circuit's view of the FRCD, when a potential plaintiff reaches the fork in the road – having some knowledge of potential cause of his or her injury and some information questioning causation, (s)he is entitled to "stay put" without risking dismissal of his

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[6] Respondents fail to explain why "official reassurances" or information questioning causation raise a "genuine issue of material fact" to prevent summary judgment or why these "facts" should be considered under the accrual analysis to toll or delay the statute of limitations. If the DOH or the DEC had a duty to disclose to plaintiffs and failed in that duty, perhaps plaintiffs would have a claim against the agencies for negligence. For the reasons set forth in the Petition, however, third-party reassurances do not "excuse" plaintiff's delay in bringing suit.

claims as stale.[7] Under this view, a plaintiff's claims accrue as a matter of law only after (s)he has definitive "proof" of causation (which (s)he may never have).[8] The Second Circuit relies on what "gives plaintiffs no reason to know" (see Pet. App. A at p. 60a) rather than the readily available (and thus imputed) knowledge resulting from a diligent inquiry. This is not the law of accrual.

Moreover, Respondents persist in their argument, made to the court below, that one should impose a duty to disclose on third parties rather than a duty to inquire on plaintiffs. Respondents urge that their claims should not be time-barred "by their subjective failure to exercise reasonable diligence." Br. in Opp. pp. 12-13 n.3. Respondents cite no authority, however, for tolling the statute of limitations where they have admittedly failed in their duty of diligent inquiry. *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cited in a footnote on page 13 of their brief, does not hold that a plaintiff may take advantage of equitable tolling or avail himself of the "discovery rule" in the absence of diligence. Unlike *Hobson,* this case does not raise the specter of fraudulent concealment. More importantly, Respondents have acknowledged they made no inquiry at all. Respondents' argument has been

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[7] This, of course, is completely hypothetical. As set forth below and in the Petition, Respondents admit they made no inquiry, thus never started down the road in the first place.

[8] Respondents make the strange concession that their claims "may have accrued" as early as 1991 and that the Second Circuit only "found there was evidence sufficient to create an issue of fact." Br. in Opp. p. 13 n.4. Under the Second Circuit's analysis, however, there will always be a question of fact absent definitive proof of causation. Respondents' concession highlights the effect of permitting substantive factors in an objective "discovery rule" analysis.

denounced by this Court and should be disregarded. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949); *United States v. Kubrick*, 444 U.S. 111, 122-24 (1979) (restricting the application of the discovery rule to "blameless ignorance").

True, the Second Circuit's interpretation may give plaintiffs "greater access to the courts." Pet. App. A at 14a. The FRCD, however, already extends the time within which a plaintiff may commence suit. The Second Circuit accrual rule cannot be satisfied absent proof certain of causation, will never be satisfied as a matter of law, rewards the dilatory, and rewards weak causation cases. As such, this new rule disturbs the balance underlying statutes of repose.

Certiorari is warranted now to halt the further erosion and corruption of this important aspect of the law. Courts are already seizing on the Second Circuit's ruling in *Freier* and refusing to hold to an objective accrual analysis in latent injury cases. *See, e.g., Lessord v. General Electric Co.*, 2002 U.S. Dist. LEXIS 24839 (W.D.N.Y. Aug. 29, 2002) (applying FRCD to raise issue of fact as to accrual). As set forth in the Petition at pages 21-28, the split in the circuits as to the application of the "discovery rule" continues to confound the issue.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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